93-742

Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

JASON STEGE and JUSTIN STEGE,

Petitioners

v.

C. JOSEPH GIRARD and MITCHELL B. TRIMMER,

Respondents.

Petition for a Writ of Certiorari
to the United States
Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Has qualified immunity become an impervious shield for police officers who violate established constitutional rights?

(2) Has the exigent circumstances exception dispensed with the warrant requirement of the Fourth Amendment?

The Decision of the Tenth Circuit Court of Appeals finds that the Defendants are entitled to qualified immunity because "the law at the time of this incident did not clearly establish whether these offenses were sufficient to justify a warrantless entry based upon probable cause and exigent circumstances." The offenses referred to are "disorderly conduct and the possession, by and the provision of liquor and alcoholic beverages to, those under age 21, which are petty misdemeanors." The Decision went on to state that "the offense of contributing to the delinquency of a minor, a fourth degree felony... was also implicated". This statement is in error because it overlooks the fact that Lt. Girard, the officer in charge who ordered the entry into the Stege home, stated in his affidavit filed February 14, 1992 at paragraph 7 that "**after** entering the residence and considering the circumstances I **considered** that contributing to the delinquency of minors **might** be an appropriate charge against the

Stege brothers. (emphasis added) This Court evaluates Defendants' actions based on the facts known to Defendants before they made the challenged entry into the Stege home. It is also important to note that Defendants Girard or Trimmer did not charge any person at any time with contributing to the delinquency of a minor and no mention of such a charge is found in any of the police reports but rather first appears in the affidavit prepared to resist Plaintiff's motion for summary judgment.

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JURISDICTION AND PRIOR APPEALS

This is an appeal of an action for violation of Federal Civil Rights. Jurisdiction of the district court was invoked under 28 U.S.C. 1331 and was not disputed below. This is an appeal from the Final Decision of the District Court entered on October 22, 1992 (Appendix, Page 1) the Notice of Appeal was filed October 30, 1992. The Tenth Circuit Court of Appeals entered its Order and Judgment on June 29, 1993 (Appendix, Page 3) the Tenth Circuit Court of Appeals entered an Order Denying Appellants' Petition for Rehearing with Suggestion for Rehearing En Banc on August 23, 1993 (Appendix, Page 8).

CONSTITUTIONAL PROVISION

"Amendment IV. The right of the people to be secure in their persons, houses, papers and effects against reasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probably cause, supported by Oath or affirmation, and particularly describing the place to be searched and persons or things to be seized."

THE FACTS

The parties in their initial Pre-Trial Report , the Pre-Trial Order and at trial stipulated to the following facts:

1. On Friday, June 29, 1991, at approximately 11:43 p.m. GIRARD and TRIMMER along with other officers responded to a report of a loud party in the 3200 block of Walnut Street in Los Alamos, Los Alamos County, New Mexico.

2. Upon TRIMMER's arrival at the scene he heard several people yelling loudly inside of 3272 A Walnut Street.

3. TRIMMER and GIRARD went to the front door of the residence.

4. TRIMMER looked in the window of the front door and observed an individual later identified as David Danforth ("Danforth") who he knew to be under the age of 21 years.

5. TRIMMER observed Danforth open a can of Miller Genuine Draft beer.

6. TRIMMER observed Eric Hall ("Hall") sitting on a couch in the living room playing cards. There were several open beer containers in front of Hall on the table he was playing on. TRIMMER knew Hall to be under the age of 21 at the time.

7. TRIMMER told GIRARD that he could see an individual who he recognized to be a minor with a beer can in his hand. GIRARD told TRIMMER to knock on the door.

8. Upon TRIMMER knocking on the door there was a shout of "cops" from inside the residence and many footsteps could be heard running toward the back of the house and other footsteps going up a stairway.

9. The door was opened by JASON. JASON was informed that a minor had been observed drinking in the residence and that the police were coming in. JASON blocked the door denying entrance to GIRARD and TRIMMER and told GIRARD and TRIMMER that they could not enter the house.

10. GIRARD and TRIMMER told JASON that they were coming in and ordered him to move.

11. JASON continued to block the door.

12. GIRARD and TRIMMER pushed the door open as JASON continued to try to force the door closed.

13. As soon as GIRARD and TRIMMER entered the house, TRIMMER placed JASON under arrest for resisting the lawful order of a police officer contrary to Section 30-22-1D, NMSA 1978 Comp.

14. TRIMMER then made contact with JUSTIN who informed him that he also lived in the house. TRIMMER then placed JUSTIN under arrest for buying, selling, or giving alcohol to minors contrary to Section 60-7B-1(A)(4), NMSA 1978 Comp. JUSTIN and JASON were then both hand-cuffed and placed on a couch in the living room.

15. JASON and JUSTIN stated to TRIMMER that they had not given any alcohol to anyone.

16. TRIMMER informed them by having alcohol on the premises and permitting minors and juveniles to consume the alcohol on the premises constituted the charge. JASON and JUSTIN were transported to the Los Alamos Police Department and booked at the County jail. At that time TRIMMER informed JASON and JUSTIN that he was also charging them with disorderly conduct because of the initial complaint and the loud profane yelling he had heard coming from their residence contrary to Section 30-20-1, NMSA 1978 Comp.

17. The Magistrate Judge for the County of Los Alamos Marthanne Reinhard was then contacted and JASON and JUSTIN were released from jail on bond.

18. JASON was tried before a jury of six persons in the Magistrate Court of Los Alamos County on August 23, 1991.

19. At the time TRIMMER and GIRARD took the above actions they were acting under the color of the state law specified above.

THE CLEARLY ESTABLISHED LAW

William Pitt the Elder in the 1700's in an address to the House of Commons set forth the basic principle of common law in regard to the sanctity of a person's home:

> "The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; it's roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his forces dares not cross the threshold of the ruined tenement." *The Right of the People to Be Secure*, Charles E. Moylan, Jr., National College of District Attorneys, Second Edition.

This Court in a decision written by Mr. Justice Stevens in Payton v. New York reviewed the history of the adoption of this principle of law in our country.

> "It is familiar history that indiscriminate searches and seizures conducted under the authority of 'general warrants' were the immediate evils that motivated the framing and adoption of the Fourth Amendment."

The Payton Court noted that:

> "Vivid in the memory of the newly independent Americans were those general warrants known as writs of assistance under which officers of the Crown had so bedeviled the colonists. The hated writs of assistance had given customs officials blanket authority to search where they pleased for goods imported in violation of British tax laws. They were denounced by James Otis as 'the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book,' because they placed 'the liberty of every man in the hands of every petty officer.' The historic occasion of that denunciation, in 1761 at Boston, has been characterized as 'perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. 'Then and there,' said John Adams, 'then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born'."

The Payton Court described the adoption of the Fourth Amendment:

> "Indeed, as originally proposed in the House of Representatives, the draft contained only one clause, which directly imposed limitations on the issuance of warrants, but imposed no express restrictions on warrantless searches or seizures. As it was ultimately adopted, however, the Amendment contained two separate clauses, the first protecting the basic right to be free from unreasonable searches and seizures and the second requiring that warrants be particular and supported by probable cause..."

The Amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Payton Court went on to state that:

> "It is thus perfectly clear that the evil the Amendment was designed to prevent was broader than the abuse of a general

warrant. Unreasonable searches or seizures conducted without any warrant at all are condemned by the plain language of the first clause of the Amendment ... As the Court reiterated just a few years ago, the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.' United States v. United States District Court, 407 U.S. 297, 313, 92 S.Ct. 2125, 2134, 32 L.Ed.2d 752. And we have long adhered to the view that the warrant procedure minimizes the danger of needless intrusions of that sort. As Mr. Justice Jackson so cogently observed in Johnson v. United States, 333 U.S. 10, 13-14, 68 S.Ct. 367, 369, 92 L.Ed. 436: 'The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern

> to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent."

The Payton Court then stated:

> "It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable. As the Court stated in Coolidge v. New Hampshire 'Both sides to the controversy appear to recognize a distinction between searches and seizures that take place on a man's property--his home or office--and those carried out elsewhere. It is accepted, at least as a matter of principle, that a search or seizure carried out on a suspect's premises without a warrant is per se unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions based on the presence of 'exigent circumstances'."

THE EXCEPTION

This Court in Welsh v. Wisconsin, 466 U.S. 740, 104 S.Ct. 2091 80 L.Ed.2 732 (1984) applied the above principles to facts very similar to those stipulated to by the parties when it held that warrantless, night time entry into a home to arrest an individual for driving under the influence of an intoxicant was prohibited by the Fourth Amendment.

> "Consistently with these long-recognized principles, the Court decided in Payton v. New York, supra, that warrantless felony arrests in the home are prohibited by the Fourth Amendment, absent probable cause and exigent circumstances. Id., 445 U.S., at 583-590, 100 S.Ct., at 1378, 1382. At the same time, the Court declined to consider the scope of any exception for exigent circumstances that might justify warrantless home arrests, id., at 583, 100 S.Ct., at 1378, thereby leaving to the lower courts the initial application of the exigent-circumstances exception. Prior decisions of this Court, however, have emphasized that exceptions to the warrant requirement are 'few in number and carefully delineated,' United States v. United States District Court, 407 U.S., at 318, 92 S.Ct., at 2137, and that the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests."

The Welsh Court at page 750 went on to state:

> "Our hesitation in finding exigent circumstances, especially when warrantless arrests in the home are at issue, is especially appropriate when the underlying offense for which there is probable cause to arrest is relatively minor. Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries. See Payton v. New York, supra, 445 U.S., at 586, 100 S.Ct., at 1380. When the government's interest is only to arrest for a minor offense, that presumption of unreasonableness is difficult to rebut, and the government usually should be allowed to make such arrests only with a warrant issued upon probable cause by a neutral and detached magistrate. Even the dissenters in Payton, although believing that warrantless home arrests are not prohibited by the Fourth Amendment, recognized the importance of the felony limitation on such arrests. See 445 U.S., at 603, 616-617, 100 S.Ct., at 1388, 1395-1396 (WHITE, J., dissenting) ('The felony requirement guards against abusive or arbitrary enforcement and ensures that invasions of the home occur only in case of the most serious crimes.'). This is not a novel idea. Writing in concurrence in McDonald v. United States, 335 U.S. 451, 69 S.Ct. 191, 93 L.Ed. 153

(1948), Justice Jackson explained why a finding of exigent circumstances to justify a warrantless home entry should be severely restricted when only a minor offense has been committed:

"Even if one were to conclude that urgent circumstances might justify a forced entry without a warrant, no such emergency was present in this case. This method of law enforcement displays a shocking lack of all sense of proportion. Whether there is reasonable necessity for a search without waiting to obtain a warrant certainly depends somewhat upon the gravity of the offense thought to be in progress as well as the hazards of the method of attempting to reach it.... It is to me a shocking proposition that private homes, even quarters in a tenement, may be indiscriminately invaded at the discretion of any suspicious police officer engaged in following up offenses that involve no violence or threats of it. While I should be human enough to apply the letter of the law with some indulgence to officers acting to deal with threats or crimes of violence which endanger life or security, it is notable that few of the searches found by this Court to be unlawful dealt with that category of crime.... While the enterprise of parting fools from their money by the 'numbers' lottery is one that ought to be suppressed, I do not think that its suppression is more important to society than the security of the people against unreasonable searches and seizures. When an officer

> undertakes to act as his own magistrate, he ought to be in a position to justify it by pointing to some real immediate and serious consequences if he postponed action to get a warrant." Id., at 459-460, 69 S.Ct., at 195-196 (Jackson, J., concurring)

The Welsh Court then surveyed various holdings of the lower courts and found at page 751 that:

> "most have refused to permit warrantless home arrests for nonfelonious crimes."

The Welsh Court then stated:

> "We therefore conclude that the common sense approach utilized by most lower courts is required by the Fourth Amendment prohibition on 'unreasonable searches and seizures,' and hold that an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made. Moreover, although no exigency is created simply because there is probable cause to believe that a serious crime has been committed, see Payton, supra, application of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense, such as the kind at issue in this case, has been committed."

The Tenth Circuit's decision relies on the case of Bledsoe vs. Garcia, 742 F.2d 1237, 1241 (10th Cir. 1984) which was filed three months after this Court announced its decision is Welsh. The Tenth Circuit in Bledsoe found that it was appropriate for policemen to pursue a sailor who had just admitted to them while he was outside his home that he was AWOL and who then fled into his home. The Bledsoe Court stated "the unauthorized absence from the military unit for almost two months is a serious offense." Four years later (and three years before the invasion of the Stege home) the Tenth Circuit in the case of United States v. Aquino , 836 F.2d 1268 (1988) in applying Welsh established the rule in that Circuit when it stated at page 1270 that:

> " '[T]he most basic constitutional rule' in the search and seizure area is that exceptions to the warrant requirement must be 'specifically established,' 'well delineated' and 'jealously and carefully drawn.' [FN3] Coolidge v. New Hampshire, 403 U.S. 443, 454-55, 91 S.Ct. 2022, 2032, 29 L.Ed.2d 564 (1971). The notion that emergency circumstances may in appropriate cases make a warrantless search constitutional if probable cause exists is a clearly established exception to the warrant requirement. Welch v. Wisconsin, 466 U.S. 740, 749-50, 104 S.Ct. 2091, 2097, 80 L.Ed.2d 732 (1984). The

contours of a sufficient emergency, however, remain unclear. See Coolidge, 403 U.S. at 455, 91 S.Ct. at 2032 (exception to warrant requirement requires 'that the exigencies of the situation made that course imperative'). Because this is the third drug investigation/exigent circumstance case to reach this court in the past year, see United States v. Chavez, 812 F.2d 1295 (10th Cir.1987); United States v. Mabry, 809 F.2d 671 (10th Cir.1987), we examine the question closely. We begin by exploring the relevant Supreme Court pronouncements on the issue. When police seek to enter a home without a warrant, the government bears the burden of proving that sufficient exigency exists. See Coolidge, 403 U.S. at 455, 91 S.Ct. at 2032; Vale v. Louisiana, 399 U.S. 30, 34, 90 S.Ct. 1969, 1971, 26 L.Ed.2d 409 (1970). Because "[i]t is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable," Payton v. New York, 445 U.S. 573, 586, 100 S.Ct. 1371, 1380, 63 L.Ed.2d 639 (1980), this burden is especially heavy when police seek to enter a suspect's home even pursuant to a legitimate seizure. See Vale, 399 U.S. 30, 90 S.Ct. 1969, 26 L.Ed.2d 409 (proper street arrest pursuant to a warrant does not justify house search); Steagald v. United States, 451 U.S. 204, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981) (search warrant required to arrest individual in the home

> of a third person); Payton, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (arrest warrant required to seize a person in his own home)."

The Aquino Court then established the test for the Tenth Circuit as follows:

> "The Supreme Court cases discussed above mandate the following conclusions: An exception to the warrant requirement that allows police fearing the destruction of evidence to enter the home of an unknown suspect should be (1) pursuant to clear evidence of probable cause, (2) available only for serious crimes and in circumstances where the destruction of the evidence is likely, (3) limited in scope to the minimum intrusion necessary to prevent the destruction of evidence, and (4) supported by clearly defined indicators of exigency that are not subject to police manipulation or abuse. Accordingly, the test in this circuit requires probable cause and exigent circumstances."

APPLICATION OF THE FACTS TO THE RULE AND EXCEPTION

Defendants below relied on United States v. Carr ,939 F.2d 442, (10th Cir. 1991) as analogous to the facts of this case to support their contention that their warrantless entry of the Stege home and arrest of the

Plaintiffs was justified. Plaintiffs submit that Carr is a good example of what is required of law enforcement officers in the Tenth Circuit. Carr demonstrates the failure of Defendants Girard and Trimmer to meet the requirements of this Court and the Tenth Circuit. Using the guidelines established in United States v. Acquino, 836 F.2d 1268 (10th Cir. 1988) the following is a contrast between the Carr case and this case. The Carr Court at page 1447 set forth the facts of that case.

A. Clear Evidence of Probable Cause. At the point Defendants Girard and Trimmer decided to enter the Stege home without a warrant their evidence consisted of having observed an individual who Cpl. Trimmer knew to be between the ages of 18 and 21 with a can of beer in his hand. In addition Lt. Girard heard "loud talking and music coming from the open windows" . The possible offenses of minor in possession of alcohol and disorderly conduct are both petty misdemeanors under the laws of the State of New Mexico (Sections 30-20-1A and 60-7B-1(D) NMSA 1978 Comp. Disorderly conduct under the statute is defined as "engaging in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct which tends to disturb the peace". Since the loud talking and music could be heard by the officers approaching the residence from open windows

on a summer night it is arguable whether the noise from the party was unreasonably loud. Further, Section 60-7B-1(D) makes it an offense for a minor to be in possession of alcohol only "outside the presence of the minor's parent, guardian, adult spouse or adult person into whose custody a Court has committed the minor for the time". Defendants from peeking in the Steges' window could not be certain that either Mr. Danforth or Mr. Hall's parents were not present at the party

B. Circumstances Involving Serious Crimes and Where the Destruction of Evidence is Likely. The officers in the Carr case suspected the occupants of a motel room were trafficking in cocaine (a second degree felony under Section 30-31-20 NMSA 1978 Comp.) and distributing Phencyclidine (a third degree felony under Section 30-31-22 NMSA 1978 Comp.). The Defendants have maintained that David Danforth, a 19 year old adult (Criminal Complaint, Section 28-6-1 NMSA 1978 Comp.) holding a can of Miller beer in his hand and presumably talking loudly is in the same class of "serious crime" offenders as the defendants in Carr. This Court evaluates the actions of the Defendants upon the basis of the evidence they had prior to the entry of the Stege home not what evidence was gained after the warrantless entry. If the facts of this case support a definition of a serious crime, one

must ask what crime would not meet that definition? In fact, Defendant Trimmer, under examination by his own counsel, acknowledged that Los Alamos does not have what is generally considered serious crime such as crimes of violence.

C. Limited in Scope to the Minimum Intrusion Necessary to Prevent Destruction of Evidence. The officers in the Carr case stated that they decided to speak with the occupants of Room 230 "in the hope that the occupants would consent to a search of the motel room." The Stipulated Facts and Defendant Trimmer's testimony demonstrate that Jason clearly manifested to the Defendants that they did not have consent to enter his home. The Carr officers acknowledged that they obtained a pass key to Room 230 and that they planned to use the key to gain entry in order to detain the occupants if the occupants should refuse permission to search the motel room and had that occurred the officers planned to undertake a protective sweep and detain the occupants until a search warrant could be obtained. The officers in the Carr case after they entered the room limited their actions to securing the room and suspects. No search of the room was conducted until a search warrant was obtained about two hours later. In contrast, Defendants Girard and Trimmer have never indicated that they even considered the need for

obtaining a search warrant either before or after their entry into the Stege home. Rather, under Defendant Girard's orders the police arrested all 25 persons present at the Stege residence and seized 70 open cans and bottles of beer. The Tenth Circuit in United States v. Mendoza-Salgado 964 F.2d 993, 1010 (10th Cir.1992) recently expressed its concern in this regard:

> "Although we do not decide the issue here, we express our deep concern over the agents' failure to begin the warrant process before entering Mr. Garcia's house. This court has 'never held that police can automatically justify the warrantless entry of a home merely by engaging in a two-part drug transaction and interrupting it after the first part.' United States v. Aquino, 836 F.2d 1268, 1273 (10th Cir.1988). We note that our previous cases involving exigent circumstances have emphasized that the police 'began the process of obtaining a warrant as soon as they had probable cause.' Aquino, 836 F.2d at 1273-74. Here it appears agents had several hours to initiate attempts to obtain a warrant. As we noted in Aquino, "[t]he officers' failure to begin the process of obtaining a warrant is especially troubling in a case involving a home, concerning as does the privacy interests of innocent individuals who might, as here, be living with the suspected drug dealer." Id. at 1274. Not only does proper observance of the

> warrant requirement protect individuals' privacy interests, but it also prevents police from needlessly jeopardizing the government's case against suspected drug dealers." Id.; see also United States v. Chavez, 812 F.2d 1295, 1300 (10th Cir.1987).

It is interesting to note that the magistrate jury had the similar criticism of the Defendants' actions in this case. The jury was required to consider the lawfulness of Defendant Trimmer's order to Jason Stege that the police be allowed into the house in order to determine Jason's guilt or innocence on the charge of resisting the lawful order of a police officer. The jury convicted Jason of disorderly conduct but acquitted Jason of the charges of resisting the lawful order of a police officer and the charge of selling or giving alcohol to minors. The jury requested and was granted an opportunity to explain its verdict to the magistrate and the parties. The jury's rationale was that the entry of the Stege home was illegal since the police had an opportunity to seek a search warrant after they looked into the window and before they knocked on the door. The exigent circumstances claimed by the police did not exist, according to the jury, since the evidence was undisputed that the occupants of the home were unaware of the presence of the police until after the police knocked on the door.

D. Exigent Circumstances. Defendants below argued that their warrantless entry into the Stege residence was justified by their concern that evidence was being destroyed, persons were attempting to escape out the back door and that there was a possibility that minors who had consumed alcohol would be driving on the streets of Los Alamos. A review of the Stipulated Facts and the record simply does not support this contention. With the police surrounding the residence how would the occupants of the residence be able to destroy or dispose of 70 cans of beer? How would they flee? In fact, those who did attempt to flee were detained by the police in the back. With the Stege home surrounded how could the persons present drive on the streets of Los Alamos without first passing police inspection outside the home. Indeed, on page 1 of the Lt. Girard's Narrative Report of the incident dated July 2, 1991, he states "no one in the residence appeared to be impaired and after they were identified, they were told to leave". The Tenth Circuit has defined exigent circumstances in United States v. Smith, 797 F.2d 836, 840 (10th Cir.1986) as arising when:

> (1) the law enforcement officers ... have reasonable grounds to believe that there is immediate need to protect their lives or others or their property or that of others, (2) the search [is not] motivated by an intent to arrest and seize evidence,

> and (3) there [is] some reasonable basis, approaching probable cause, to associate an emergency with the area or place to be searched. U.S. v. Butler (Billy Deon), --- F.2d ----, 1992 WL 341796 (10th Cir.(Okl.), Nov 23, 1992) (NO. 91-7128)

The trial court in ruling for the Defendants found not only were they entitled to qualified immunity but that their actions were lawful. To accept the court's ruling that Defendant's actions were lawful would be contrary to the rule that "[T]he most basic constitutional rule" in the search and seizure area is that exceptions to the warrant requirement must be "specifically established," "well delineated" and "jealously and carefully drawn." Coolidge v. New Hampshire, 403 U.S. 443, 454-55, 91 S.Ct. 2022, 2032, 29 L.Ed.2d 564 (1971) United States v. Aquino , 836 F.2d 1268 (1988) .

CONCLUSION

Sir Edward Coke wrote in 1644 that "a man's house is his castle." Perhaps we have to retire the Fourth Amendment as a centuries old anachronism unsuitable for today's law and order society. We will do so if police are able to utter the magic words "exigent circumstances" like "open sesame" to dispense with the warrant requirement for the entry into a person's home.

We would likewise do so if we allow the words "qualified immunity" to become an impervious shield for officers who violate established constitutional rights. Plaintiffs-Appellants urge this Court to stop the Fourth Amendment's slide down the slippery slope of exceptions into oblivion. The time has come for this Court to give effect to its many pronouncements of the sanctity of a person's home and hold Defendants liable for their unwarranted violation of Plaintiffs' rights to be secure in their home.

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APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

JASON STEGE, JUSTIN STEGE	)	
	)	
Plaintiffs-Appellants,	)	
	)	
v.	)	
	)	**(No. CIV-**
	)	**91-**
	)	**1087-**
	)	**SC)**
C. JOSEPH GIRARD, MITCHELL B. TRIMMER	)	
	)	
	)	
Defendants-Appellees.	)	**Filed**
	)	**10/22/92**

JUDGMENT IN A CIVIL CASE

This action came to trial before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendant's oral motion for judgment as a matter of law at the close of plaintiff's evidence is GRANTED, and plaintiffs JASON STEGE and JUSTIN STEGE to take nothing and the action is dismissed on the merits for the reasons outlined in the memorandum of the court (attached). Defendants C. JOSEPH GIRARD and MITCHELL B. TRIMMER to recover their costs of action.

Dated this 21st day of October, 1992 at Santa Fe, New Mexico.

/s/ Dale Saffels
United States
District Judge

MOTION TO DISMISS

Based upon the evidence presented by the plaintiffs in their case-in-chief and the previously stipulated facts, the court finds that the defendants' motion to dismiss on the basis of qualified immunity must be granted and the case dismissed.

The law is clearly established that there must be probable cause and exigent circumstances to do a warrantless search and seizure. Further, police officers must have probable cause to arrest individuals without a warrant.

Under the facts of this case, it was objectively legally reasonable for the defendants to believe they could enter the Stege residence and seize evidence without a warrant, and arrest the plaintiffs for certain criminal offenses without a warrant. The police officers saw evidence of serious offenses being committed within the house with minors consuming and possibly being furnished alcohol. When people began fleeing

after the officers knocked on the door, there was a concern about the destruction of evidence as well as the escape of the suspects. The defendants had observed violations of the law both from outside the house and in their presence to suggest to them that they had probable cause to arrest the plaintiffs.

By entering the Stege residence and arresting the plaintiffs, a reasonable police offer would not have believed he or she was violating the civil rights of the plaintiffs. Based upon the facts before this court, it is clear the defendants are entitled to qualified immunity.

The court, therefore, grants the defendants' motion to dismiss. The plaintiffs' motion for summary judgment is denied.

Even if the defendants were not entitled to qualified immunity, the court would direct a verdict for the defendants. On the facts of this case, it is clear that the police officers acted lawfully and there can be no liability for their actions.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JASON STEGE, JUSTIN STEGE	)	
	)	
Plaintiffs-Appellants,	)	
	)	
v.	)	No. 92-2231
	)	(D.C. No. CIV-91-1087-SC)
	)	
C. JOSEPH GIRARD, MITCHELL B. TRIMMER	)	(D.N.M.)
	)	
Defendants-Appellees.	)	Filed 6/29/93

ORDER AND JUDGMENT*

Before SEYMOUR and TACHA, Circuit Judge, and ROGERS,** Senior District Judge

**Honorable Richard D. Rogers, United States District Judge for the District of Kansas, sitting by designation.

After examining the briefs and appellate record, this panel has determined unanimously that oral

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R 34.1.9. The case is therefore ordered submitted without oral argument.

In this civil rights action, 42 U.S.C. § 1983, plaintiffs appeal the district court's decision directing a verdict in favor of defendants following the close of plaintiffs' case-in-chief. This litigation stems from an incident during which defendants, Los Alamos, New Mexico, police officers, entered plaintiffs' home during the course of a party involving underage individuals drinking beer and arrested plaintiffs without either search or arrest warrants. The district court determined that defendants were entitled to qualified immunity and, alternatively, that they were, as a matter of law, entitled to judgment in their favor because they had acted lawfully.

This court reviews a directed verdict de novo. See First Sec. Bank v. Taylor, 964 F. 2d 1053, 1055 (10th Cir. 1992) (reviewing denial of directed verdict). "A directed verdict is appropriate only if the evidence, viewed in the light most favorable to the nonmoving party, 'points but one way and is susceptible to no reasonable inferences supporting' the nonmoving party." Riggs v. Scrivner, Inc.,, 927 F. 2d 1146 , 1149 (10th Cir) (quoting Zimmerman v. First Fed. Sav.

& Loan Ass'n, 848 F.2d 1047, 1051 (10th Cir. 1988)), cert. denied, 112 S. Ct. 196 (1991). Because we conclude that defendants were entitled to qualified immunity, we need not address whether defendants' conduct was lawful.

"[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, . . . assessed in light of the legal rules that were 'clearly established' at the time it was taken." Anderson v. Creighton, 483 U.S. 635, 639 (1987) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818, 819 (1982)). Once defendants asserted qualified immunity, plaintiffs bore the burden of establishing both that defendants' alleged conduct violated the law and that the law was clearly established when the alleged violation occurred. See Patrick v. Miller, 953 F.2d 1240, 1243 (10th Cir. 1992). Because plaintiffs failed to establish that defendants' alleged conduct violated law clearly established at the time of this incident, defendants were entitled to qualified immunity.

Plaintiffs argue, among other things, that the offenses involved in this case are not sufficiently serious to justify the warrantless entry. Under New Mexico law, the offenses implicated by these

circumstances include disorderly conduct and the possession by, and the provision of liquor and alcoholic beverages to, those under age twenty-one, which are petty misdemeanors, see N.M. Stat. §§30-20-1, 60-7B-1D, 60-7B-1.1F; see also N.M. Stat.§ 60-7A-25A (persons violating any provision of New Mexico's Liquor Control Act that is not designated as a felony, are guilty of a petty misdemeanor), punishable by not more than six months' imprisonment or a fine of no more than $500, or both, see N.M. Stat. §31-19-1. The offense of contributing to the delinquency of a minor, a fourth degree felony, see N.M. Stat. §30-6-3, punishable by eighteen months' imprisonment and a $5,000 fine, see N.M. Stat.§ 31-18-15, was also implicated.

At the time of this incident, June 19, 1991, the Supreme Court had held that a noncriminal civil forfeiture offense for which no imprisonment was possible was not a sufficiently serious offense to justify a warrantless entry, despite the existence of probable cause and exigent circumstances. Welsh v. Wisconsin, 466 U.S. 740, 754 (1984). Further, this court had held that a misdemeanor punishable by less than one year's imprisonment could be a sufficiently serious offense to justify a warrantless home entry. See Bledsoe v. Garcia, 742 F.2d 1237, 12241 (10th Cir. 1984).

While the existence of clearly established law does not require that there be relevant authority addressing the specific circumstances presented in this particular case, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson, 483 U.S. at 640. The law at the time of this incident did not clearly establish whether these offenses were sufficient to justify a warrantless entry based upon probable cause and exigent circumstances. We, therefore, agree with the district court that an objectively reasonable officer could have believed that the warrantless entry was lawful.

Plaintiffs' remaining arguments are unpersuasive. The judgment of the United States District Court for the District of New Mexico, is, therefore, AFFIRMED.

Entered for the Court

Deanell Reece Tacha
Circuit Judge

No. 92-2231,
Stege v. Girard

SEYMOUR, Circuit Judge, dissenting:
I dissent

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JASON STEGE, JUSTIN STEGE	)	
	)	
Plaintiffs-Appellants,	)	
	)	
v.	)	No. 92-2231
	)	
C. JOSEPH GIRARD, MITCHELL B. TRIMMER	)	
	)	
Defendants-Appellees.	)	

ORDER AND JUDGMENT*
Entered August 23, 1993

Before McKAY, Chief Judge, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, and KELLY, Circuit Judges, and ROGERS,* Senior District Judge.

*Honorable Richard D. Rogers, United States District Judge for the District of Kansas, sitting by designation.

This matter is before the court on appellants' petition for rehearing with suggestion for rehearing in banc.

The materials submitted by appellants have been reviewed by the members of the hearing panel, who conclude that the original disposition was correct. Judge Seymour, however, would grant rehearing. The petition is, therefore, denied on the merits.

The petition have been denied on the merits by the panel to which the case was submitted, the suggestion for rehearing in banc was transmitted to all the judges of the court in regular active service in accordance with Rule 35 (b) of the Federal Rules of Appellate Procedure. No member of the hearing panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

ROBERT L. HOECKER
Clerk

By: Patrick Fisher
Chief Deputy Clerk